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Estate of Lim Tuan & Ors v Lim San Peen & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-1193–06 OF 2017
HAMID SULTAN, BADARIAH SAHAMID AND MARY LIM JJCA
30 NOVEMBER 2018

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Companies and Corporations — Liquidators — Remuneration — Liquidators engaged in voluntary winding up of company sought directions from court regarding their remuneration — Whether liquidators' application was flawed and should have been dismissed in limine — Whether court had no power/jurisdiction to determine liquidators' remuneration in a voluntary winding up scenario since the fees in such cases were determined by agreement between the parties — Whether if there was dispute as to their fees the liquidators should discharge themselves and sue for fees for work done

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The first and second respondents ('the liquidators') were the joint liquidators of Semantan Estate (1952) Sdn Bhd which was voluntarily wound up by its members. All the other parties in this action were the contributories of the company. By an application made pursuant to ss 237(3) and 274 of the Companies Act 1965 ('the CA'), the liquidators applied for directions from the High Court to, inter alia, determine their remuneration. The liquidators proposed that their remuneration be determined by a mixture of fixed fees and fees based on a percentage of assets realised. The High Court found the proposal to be fair and reasonable and gave directions accordingly including an order that each of the contributories make a pro-rated cash advance in proportion to their respective shareholdings in the company to the liquidators to defray expenses related to the liquidation exercise. In their instant appeal against the decision, the appellants argued, inter alia, that: (a) a fair and reasonable basis for taxing the liquidators' fees was on a 'time-cost' basis and not the one proposed by the liquidators; (b) in order to assess what was a fair and reasonable remuneration, the liquidators had to first show what work they had done but no evidence in this regard was put before the court; (c) the judge failed to consider whether the estate had sufficient assets to pay the liquidators; and (d) a contributory could not be compelled under the CA to provide a cash advance to meet the expenses incurred by the liquidator.

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Held, unanimously allowing the appeal:

(1) The liquidators' application under ss 237 or 274 of the CA to seek directions to fix their remuneration was flawed and the High Court ought to have dismissed the application *in limine*. The court had no

power or jurisdiction to deal with the question of remuneration under both the said sections. Section 237 related to compulsory winding up while s 274 related to voluntary winding up. The two sections could not be read together and they were not meant for the fixing of remuneration for liquidators (see paras 6 & 18).

(2) The appropriate sections to fix remuneration for liquidators were s 232 (in the case of compulsory winding up) and s 258 (in the case of members' voluntary winding up). A reading of s 258 suggested that a liquidator's remuneration was related to an agreement between the parties and was not sought through the direction of the court; the court had no power under s 258 to determine or give directions as to remuneration. If there was a dispute as to remuneration, it would appear from a reading of ss 232 and 258 that a civil suit had to be filed in the case of voluntary winding up. In the case of compulsory winding up, the court could determine the remuneration (see paras 6 & 14–16).

(3) Even if ss 237 or 274 of the CA applied, there was insufficient material before the court in the nature of expert evidence for the court to determine the issues related to remuneration. There was also a lack of evidence that the liquidators had done actual work (see para 17).

(4) A liquidator was an officer of the court (see r 63 of the Companies (Winding-Up) Rules 1972). Hence, his application for directions from the court was not appealable by him. A liquidator should not attempt to get the court's protection for unagreed fees in his favour when there were objections. Such unjust applications would raise questions of conflict of interest. Issues as to fees do not fall within the parameters of directions where it related to an order to benefit the liquidator. The liquidator should discharge himself and sue for fees. What should be fair and reasonable fees could not be determined by the court without expert opinion from members of the profession itself. It would be a misdirection if the court, by its own motion, fixed fees other than what was statutorily provided for (see paras 4–5).

(5) The issue of fees was related to a contractual bargain. The contractual bargain of any professional person in relation to his fees had to be forthcoming before his appointment and/or fixed by agreement and, in its absence, by any statutory guidelines on the scope and parameters of professional fees failing which it may have to be sorted out by writ action. A professional person should not attempt to obtain fees on a reward basis unless that arrangement was made known by the professional person at the earliest opportunity. If fees had not been agreed upon in a contractual bargain, the court should lean towards minimum fees as opposed to a reasonable fees or reward basis where the professional person himself had not set it out at the material time of his appointment. Professional persons should also not attempt to become beneficiaries of the estate to

enrich themselves and the courts should not unwittingly lend their hand in that regard. The quantum of recovery should be of little concern if the work costs would be the same regardless of the value of the estate. If the client did not agree to the professional fees or to the terms thereof, the professional person should discharge himself and sue for fees for work done and it was for the court to assess the amount, if any, after hearing expert evidence on professional fees (see para 3).

[Bahasa Malaysia summary

Responden-responden pertama dan kedua ('penyelesai tersebut') ialah penyelesai bersama Semantan Estate (1952) Sdn Bhd yang digulung secara sukarela oleh anggotanya. Kesemua pihak lain dalam tindakan ini ialah penyumbang syarikat. Melalui permohonan yang dibuat menurut ss 237(3) dan 274 Akta Syarikat 1965 ('AS'), penyelesai tersebut telah memohon arahan daripada Mahkamah Tinggi untuk, antara lain, menentukan gaji mereka. Penyelesai tersebut mencadangkan agar gaji mereka ditentukan oleh campuran fi tetap dan fi berdasarkan peraturan aset yang direalisasikan. Mahkamah Tinggi mendapati cadangan itu adil dan munasabah dan memberi arahan sewajarnya termasuk perintah supaya setiap penyumbang membuat pendahuluan tunai prarata mengikut pembahagian pegangan saham masing-masing dalam syarikat kepada penyelesai tersebut untuk membayar perbelanjaan berkaitan urusan likuidasi. Dalam rayuan mereka terhadap keputusan itu, perayu-perayu berhujah, antara lain, bahawa: (a) asas adil dan munasabah untuk mengenakan cukai ke atas fi penyelesai tersebut adlaah berdasarkan 'time-cost' dan bukan sepertimana dicadangkan oleh penyelesai tersebut; (b) bagi tujuan menaksir suatu gaji yang adil dan munasabah, penyelesai tersebut perlu terlebih dahulu menunjukkan kerja yang telah dilakukan oleh mereka tetapi tiada keterangan berkenaannya telah dikemukakan di hadapan mahkamah; (c) hakim telah gagal mempertimbangakan sama ada harta pusaka tersebut mempunyai aset yang mencukupi untuk membayar penyelesaia tersebut; dan (d) penyumbang itu boleh dipaksa di bawah AS untuk memberikan pendahuluan tunai untuk menampung perbelanjaan yang ditanggung oleh penyelesai tersebut.

Diputuskan, sebulat suara membenarkan rayuan:

(1) Permohonan penyelesai tersebut di bawah ss 237 atau 274 AS untuk memohon arahan untuk menetapkan gaji mereka telah cacat dan Mahkamah Tinggi patut menolak permohonan itu *in limine*. Mahkamah tidak mempunyai kuasa atau bidang kuasa untuk mengendalikan persoalan tentang gaji di bawah kedua-dua seksyen tersebut. Seksyen 237 berkaitan penggulungan wajib manakala s 274 berkaitan penggulungan sukarela. Kedua-dua seksyen tidak boleh dibaca bersama dan tidak bermaksud untuk menetapkan gaji untuk penyelesai tersebut (lihat perenggan 6 & 18).

(2) Seksyen-seksyen yang sesuai untuk penetapan gaji penyelesai tersebut adalah s 232 (dalam kes penggulungan wajib) dan s 258 (dalam kes penggulungan sukarela). Pembacaan s 258 mencadangkan bahawa gaji penyelesai adalah berkaitan suatu perjanjian antara pihak-pihak dan tidak dipohon melalui arahan mahkamah; mahkamah tidak mempunyai kuasa di bawah s 258 untuk menentukan atau memberi arahan berhubung gaji. Jika terdapat pertikaian berhubung gaji, ia jelas daripada pembacaan ss 232 dan 258 bahawa guaman sivil perlu difailkan dalam kes penggulungan sukarela. Dalam kes penggulungan wajib mahkamah boleh menetukan gaji (lihat perenggan 6 & 14–16).

(3) Jika pun ss 237 atau 274 AS terpakai, tiada bahan yang mencukupi di hadapan mahakmah yang bersifat keterangan pakar untuk mahkamah menentukan isu berkaitan gaji. Juga tiada keterangan bahawa penyelesai tersebut telah sebenarnya melakukan kerja itu (lihat perenggan 17).

(4) Seorang penyelesai ialah pegawai mahkamah (lihat k 63 Kaedah-Kaedah (Penggulungan) Syarikat 1972). Justeru, permohonannya untuk arahan daripada mahkamah tidak boleh dirayu olehnya. Seorang penyelesai tidak patut cuba mendapat perlindungan mahkamah untuk fi yang tidak dipersetujui bagi menyebelahinya apabila terdapat bantahan. Permohonan tidak adil sebegini akan menimbulkan persoalan tentang konflik kepentingan. Isu-isu berhubung fi tidak terjatuh dalam parameter arahan yang mana berkaitan dengan perintah yang memanfaatkan penyelesai tersebut. Penyelesai tersebut patut melepaskan dirinya dan menyaman untuk fi. Fi yang adil dan munasabah tidak boleh ditentukan oleh mahkamah tanpa pendapat pakar daripada ahli profesyen itu sendiri. Ia adalah suatu salah arah jika mahkamah, atas usulnya sensiri, menetapkan fi selain daripada apa yang diperuntukkan secara statutori (lihat perenggan 4–5).

(5) Isu fi adalah berkaitan tawaran kontraktual. Tawaran kontraktual mana-mana orang professional berkaitan finya perlu dibincangkan sebelum pelantikannya dan/atau ditetapkan dalam perjanjian dan, jika tiada, berdasarkan mana-mana garis panduan statutori berhubung skop dan parameter fi profesional dan jika gagal ia boleh diselesaikan melalui tidnakan writ. Seorang professional tidak patut cuba memperoleh fi atas asas ganjaran kecuali jika aturan tersebut diberitahu oleh seorang professional pada peluang paing awal sekali. Jika fi itu tidak dipersetujui dalam tawaran kontraktual, mahkamah patut cenderung kepada fi minimum berbanding kepada fi munasabah atau asas ganjaran di mana seorang professional itu sendiri tidak menetapkannya pada masa matan pelantikannya. Seseorang professional juga tidak patut cuba menjadi benefisiari harta pesaka untuk menguntungkan diri sendiri dan mahkamah tidak patut membantu dalam hal sedemikian. Kuantum pengembalin patut diambil kira jika kos kerja adalah sama tanpa mengira

nilai harta pusaka itu, Jika anak guam tidak bersetuju dengan fi profesional atau terma-terma tersebut, seorang profesioanl patut melepaskan dirinya dan menyaman untu fi bagi kerja yang telah dilakukan dan ia adalah untuk mahkamah menaksir jumlahnya, jika ada, selepas perbicaraan keterangan pakar berhubung fi professional (lihat perenggan 3).]

Notes

For cases on liquidators in general, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 598–611.

Cases referred to

Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713, FC (refd)

SP Veloo & Co v Affin Bank Bhd [2017] MLJU 1042; [2017] 5 AMR 537, CA (refd)

TR Hamzah & Yeang Sdn Bhd v City Centre Sdn Bhd [2012] 1 MLJ 383, HC (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 r 63

Companies Act 1965 ss 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 237(3), 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, Part X

Indian Companies Act 1956 [IND] s 518

Appeal from: Originating Summons No WA-24NCC-444–10 of 2016 (High Court, Kuala Lumpur)

P Gananathan (Iris Tan Li Chie and Carolyn with him) (Dennis Nik & Wong) for the appellants.

Rabindra Nathan (Serena Azizudin with him) (Shearn Delamore & Co) for the first and second respondents.

(Wong Kian Kheong) for the third, fourth, fifth and sixth respondents.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellants, who are the contributories of Semantan Estate (the said estate) in voluntary members' liquidation appeal against the judgment of the learned High Court judge who had, on the application of the respondents (joint liquidators of the said estate), given, inter alia, directions for fees entitlement of the liquidators.

A PRELIMINARIES

[2] The application was made pursuant to ss 237(3) and 274 of the Companies Act 1965 ('the CA 1965').

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[3] The said sections may not be wide enough to cover every form of directions to the liquidation itself, and whether contractual disputes in respect of remuneration should be dealt with under the said sections is arguable. However, it must not be forgotten that the issues of fees are related to contractual bargains. The contractual bargains by any profession in relation to C fees must be forthcoming before the appointment process and/or by agreement and in its absence by any statutory guidelines on the scope and parameters of professional fees, failing which it may have to be sorted out by writ action. A professional person should not be seen to make an attempt to obtain fees on a D reward basis as it happens in maritime salvage contract. If the fees arrangement is to be on 'reward basis' that must have been put forward by the professional person at the earliest opportunity, failing which it will impinge on integrity issues. If fees have not been agreed in contractual bargains, the court should lean towards minimum fees as opposed to a reasonable fees or reward basis E when the professional person himself has failed to set it out at the material time of appointment. Professional persons should not make an attempt to become beneficiaries of the estate. Again, such an attempt will impinge on integrity issues. The quantum of recovery should be of little concern if the work costs will be the same whether the estate is worth a million or RM100m. The court F should not, unwittingly, lend its hand to enrich a professional person to be made a beneficiary of the estate. In fact, if the clients do not agree to the professional fees or to the terms, the professional person should discharge himself and sue for their fees for work done and it is for the court to assess the amount, if any, after hearing the expert's evidence on professional fees (see *TR* G *Hamzah & Yeang Sdn Bhd v City Centre Sdn Bhd* [2012] 1 MLJ 383; *SP Veloo & Co v Affin Bank Bhd* [2017] MLJU 1042; [2017] 5 AMR 537).

[4] Liquidators are no different. A liquidator should not attempt to get the protection of the court for unagreed fees in his favour when there are H objections. Such unjust applications will raise questions of conflict of interest, especially when the apex court has appeared to rule that directions given by the winding up court, are not be appealable. Issues as to fees do not fall within the parameters of directions where it relates to an order to benefit the liquidator. The liquidator should discharge himself and sue for fees. The application of the I liquidator's fees places him in a conflict situation and courts should take cognisance of it. What should be fair and reasonable fees cannot be determined by the court without expert opinion from members of the profession itself. The court by its own motion, fixing fees other than what is statutorily provided for, will amount to misdirection.

[5] It must be noted that a liquidator is an officer of court (see r 63 of the Companies (Winding-Up) Rules 1972). In consequence, his application seeking direction from the court is not appealable though it may not deprive other affected parties from appealing. There can be difference in judicial opinion on this issue. However, it has to be settled by judicial decision by passage of time (see *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713). An officer of court who does not want to follow the direction of court and appeals may lead to contempt proceedings.

[6] In addition, it must be noted that ss 237 and 274 are not sections meant to fix remuneration. The appropriate section to fix remuneration for liquidator will be s 232 in the case of compulsory winding up and s 258 in members' voluntary winding up. A reading of s 258 will suggest that the remuneration of a liquidator is one related to agreement of parties and not one sought through the direction of court. If there is a dispute as to remuneration, it will appear from the reading of ss 232 and 258, that a civil suit has to be filed in case of voluntary winding up and only in case of compulsory winding up, that the a court may determine the issue of remuneration. Reliance on ss 237 or 274 to fix remuneration or seek direction is in our view, a flawed application and the learned judge ought to have dismissed the application *in limine*.

BRIEF FACTS AND FINDING OF THE HIGH COURT

[7] The facts of the case had been set out by the learned judge. We do not wish to repeat, save to say that this judgment must be read together with the judgment of the High Court to appreciate the laws and issues in the correct perspective.

[8] The facts before us has been summarised in a rudimentary manner and it reads as follows:

1. The plaintiffs in this case are joint liquidators of Semantan Estate (1952) Sdn Bhd, which had been voluntarily wound up by its members in 1982. The defendants in this action are the contributories of the company.
2. Semantan Estate is the beneficial owner of a piece of land of over 260 acres in Kuala Lumpur, adjacent to Bukit Tunku. This land had been previously compulsorily acquired in the 1950s.
3. This compulsory acquisition has been ruled by the courts to be unlawful.
4. The company therefore has significant receivables, on account of the compensation that it may potentially receive arising from the trespass over its land.
5. The liquidators applied to court for directions from the court in connection with, among others, the manner in which their remuneration is to be determined. Specifically, the liquidators proposed that their

remuneration be determined by reference to a mixture of fixed fees and fees reckoned in accordance with a percentage of assets realised.

FINDING(S) OF THE LEARNED HIGH COURT JUDGE

1. The High Court Judge (HCJ) of the view that the fixing of the plaintiff's remuneration on a mixture of fixed and percentage basis to be fair and reasonable in the circumstances.

2. However, in order to address the concerns advanced by counsel for first to the eleventh defendants, HCJ directed that the fixed fee portion (comprising the mobilisation fee and the monthly retainer fees) be deducted from the *ad valorem portion* of the fees at the point in time such *ad valorem* fees are to be paid (provided that such *ad valorem fees* shall not be less than zero).

3. There is ample authority to suggest that a fee determined as a percentage of realised assets would be an acceptable basis for the determination of the fees of a liquidator of a company. It is only necessary to refer to the following cases:

   (a) in *Re Carton Ltd* [1923] All ER Rep 622, it was held that the preferable method of remunerating liquidators is by reference to the results attained. Time cost should only be used where there is no other method that would operate to give the liquidator fair remuneration; and

   (b) Winding Up Rules 1972 (Table C of the Second Schedule) themselves provide for the remuneration of the Official Receiver to be determined based on realisation of net assets, where the Official Receiver is the liquidator of the company in question. It follows that, if the legislative scheme specifically anticipates that the Official Receiver's remuneration for acting as a liquidator may be based on a percentage of realisation, then it would not be unreasonable for the remuneration of a private liquidator to be determined on a similar basis.

4. It is not in dispute that the liquidation exercise is a complex one, involving protracted negotiations and discussions with the Federal Land Commissioner. The number of beneficiaries involved (between whom consensus may only rarely be attained) as well as the potentially huge sums involved (given the duration of the trespass and size of the lands in question) all add to the complexity of the liquidation exercise.

5. In HCJ view, such a method of remuneration best aligns the incentives placed upon a liquidator with the interests of the contributories. Fees determined on an *ad valorem* basis will serve as an added incentive for the liquidators to maximise the realisation for the contributories.

6. HCJ not satisfied that there is any rule of general application to the effect that percentage fees are more appropriate for smaller liquidations.

7. HCJ further directed that the applicable percentage in connection with the ad valorem fees be determined by way of a further application to court at such time when value of the realisation can reasonably be ascertained.

8. The proposed remuneration of the plaintiffs may be paid out of the assets of the company and shall be paid out in priority to all other claims.

9. HCJ ordered each of the contributories to make a pro-rated cash advance in the proportion of their respective shareholdings in the company to the plaintiffs, in the amounts specified in Appendix B to Enclosure 1.

10. Where any part of such advances are used to defray out-of-pocket expenses or other expenses related to the liquidation exercise, evidence of such expenses are to be provided to the contributories as and when they are incurred.

11. HCJ also ordered that the costs of this application be paid out of the assets of the company. Such costs to be RM20,000.

[9] The memorandum of appeal reads as follows:

1. The Learned Judge has erred in law and/or in fact in allowing the proposed remuneration for the 1st and 2nd Respondents (being the joint liquidators of Semantan Estate (1952) Sdn Bhd (In members' voluntary liquidation) ['the Company']) on a basis of a mixture of fixed fee and percentage as set out in Appendix A (attached herein and as in the Notice of Appeal) against the Appellants.

2. The Learned Judge has erred in law and/or in fact in failing to decide that the fair and reasonable basis for taxing the liquidators' fees should be on a time-cost basis.

3. The Learned Judge erred in law and/or in fact in allowing the proposed remuneration on a basis of a mixture of fixed fee and percentage when the 1st and 2nd Respondents have not shown actual work done. The Learned Judge failed to appreciate that the winding-up regime in Malaysia does not allow for liquidators to be remunerated for future work not undertaken/defined.

4. Further and alternatively, the Learned Judge was in no position to assess a fair and reasonable remuneration without any evidence being presented by the 1st and 2nd Respondents as to their scope of works, whether already undertaken or to be undertaken.

5. The Learned Judge erred in law and/or in fact when on the one hand allowing remuneration on a fixed fee and percentage basis but on the other hand, deciding that the fixed fee portion of fees be deducted from the percentage portion of the fees. In so doing, the Learned Judge in essence ordered that the remuneration be determined ultimately on a percentage basis on the realisation of the assets whilst failing to properly consider:

   (a) there was uncertainty expressed by the 1st and 2nd Respondents

A themselves as to whether the assets can be realisable on account of on-going litigation; and

(b) that there was no valuation of the assets or evidence presented to this effect before the Court.

B 6. The Learned Judge erred in law and/or in fact in allowing the fixed fee portion without considering or providing for the eventuality that the assets may not be realised. In so doing, the Learned Judge did not properly consider that remuneration cannot be ordered if there are insufficient assets to meet the remuneration.

C 7. The Learned Judge has erred in law and/or in fact in allowing an Order to direct each of the contributories of the Company to pay to the 1st and 2nd Respondents a cash advance in proportion to their respective shareholdings in the Company as set out in the last page of Exhibit A-20 to Enclosure 14 (attached herein) to the extent not already paid and where D any part of such advances are used to defray out-of-pocket expenses or other expenses related to the liquidation exercise, evidence of such expenses are to be provided by the 1st and 2nd Respondents to the contributories as and when they are incurred.

E 8. The Learned Judge has failed to take into consideration that there is no provision under the Companies Act 1965 or 2016 which allows a liquidator to compel a contributory to provide any cash advance for the expenses of the liquidator.

F 9. The Learned Judge has erred in law and/or in fact in failing to take into consideration that there is no basis or method of computation for proposing the amounts of cash advance and remuneration proposed by the liquidators. The amounts were unsubstantiated.

10. The Learned Judge has erred in law and/or in fact in failing to take into consideration that before any cash advances are made, sufficient G information and supporting documents need to be produced before the Honourable Court to enable the Court to exercise its discretion judicially.

11. The Learned Judge has erred in law and/or in fact that in all circumstances of this case wherein there is no actual evidence of work, the Honourable Justice should not have allowed the reliefs against the Appellants with costs.

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JURISPRUDENCE OF S 237(3) AS WELL AS S 274 OF THE CA 1965

[10] Section 237 of the CA 1965 is not a specific section to seek I remuneration by a liquidator. Section 237 reads as follows:

237 Exercise and control of liquidator's powers

(1) Subject to this Part the liquidator shall in the administration of the assets of the company and in the distribution thereof among its creditors have regard to any directions given by resolution of the creditors or contributories at any general

meeting or by the committee of inspection, and any directions so given by the creditors or contributories shall in case of conflict override any directions given by the committee of inspection.

(2) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and he shall summon meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories.

(3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

(4) Subject to this Part the liquidator shall use his own discretion in the management of the affairs and property of the company and the distribution of its assets.

[11] Section 237 is related to winding up orders by the court. It comes under Part X and consists of ss 211–253 and it is related to compulsory winding up. In addition, s 237, read as a whole, will not cover issues related to liquidators in terms of their fees. We do not think that we need to elaborate this point any further.

[12] Section 274 also falls under Part X related to winding up but it is covered under the caption of 'voluntary winding up' and consists of ss 254–276. Section 274 reads as follows:

274 Application to Court to have questions determined or powers exercised

(1) The liquidator or any contributory or creditor may apply to the Court —

(a) to determine any question arising in the winding up of a company; or

(b) to exercise all or any of the powers which the Court might exercise if the company were being wound up by the Court.

(2) The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.

[13] Section 274 read as a whole will not specifically cover issues related to remuneration of liquidators. The Indian Companies Act 1956 also has a similar provision as s 274 in relation to voluntary winding up. Their equipollent is s 518 and learned authors of *Guide to Company Law*, A Ramaya (11th Ed) at p 1296, deals with the section. Nothing is said about remuneration of liquidators by the author. The directions in the section is not meant for the benefit of a liquidator but other parties involved in the liquidation process. The authors, in relation to the object of the section, summarises its scope as follows:

The object of a voluntary winding-up is to leave the company, its contributories and creditors to settle their affairs, if possible, without coming to the Court either for a compulsory winding-up or a winding-up under supervision and the present section is intended to provide them with a means of access to the Court whenever any question arose which needed the assistance of the Court for its determination, without resorting to a compulsory winding-up or a supervision order which would only lead to increased expense.

[14] Section 232 of the CA 1965 relates to remuneration of liquidators in compulsory winding up. The said section gives power to the court to deal with remuneration. The said s 232 reads as follows:

232 General provisions as to liquidators

(1) A liquidator appointed by the Court may resign or on cause shown be removed by the Court.

(2) A provisional liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by the Court.

(3) A liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined —

(a) by agreement between the liquidator and the committee of inspection, if any;

(b) failing such agreement or where there is no committee of inspection by a resolution passed at a meeting of creditors by a majority of not less than three-fourths in value and one-half in number of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted to vote, which meeting shall be convened by the liquidator by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the liquidator and the amount of remuneration sought by him; or

(c) failing a determination in a manner referred to in paragraph (a) or (b), by the Court.

(4) Where the salary or remuneration of a liquidator is determined in the manner specified in paragraph (3)(a) the Court may, on the application of a member whose shareholding represent in the aggregate not less than ten per centum of the issued capital of the company, confirm or vary the determination.

(5) Where the salary or remuneration of a liquidator is determined in the manner specified in paragraph (3)(b) the Court may, on the application of the liquidator or a member referred to in subsection (4), confirm or vary the determination.

(6) Subject to any order of the Court the Official Receiver when acting as a liquidator or provisional liquidator of a company shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is prescribed.

(7) If more than one liquidator is appointed by the Court, the Court shall declare whether anything by this Act required or authorized to be done by the liquidator is to be done by all or any one or more of the persons appointed.

(8) Subject to this Act the acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.

[15] In contrast, s 258 which relates to voluntary winding up makes direct and specific provision for remuneration but does not give any powers to the court to determine the same. The distinction is not one related to an apple and an orange but a marble and a pumpkin, when ss 232 and 258 are contrasted with, and also when contrasted with ss 237 as well as 274 of the CA 1965. Section 258 of the CA 1965 reads as follows:

258 Liquidators

(1) The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company and may fix the remuneration to be paid to him or them.

(2) On the appointment of a liquidator all the powers of the directors shall cease except so far as the liquidator or the company in general meeting with the consent of the liquidator approves the continuance thereof.

(3) The company may, in general meeting convened by any contributory by special resolution of which special notice has been given to the creditors and the liquidators, remove any liquidator but no such resolution shall be effective to remove a liquidator if the Court on the application of the liquidator or a creditor has ordered that the liquidator be not removed.

(4) If a vacancy occurs by death, resignation, removal or otherwise in the office of a liquidator, the company in general meeting may fill the vacancy by the appointment of a liquidator and fix the remuneration to be paid to him, and for that purpose a general meeting may be convened by any contributory, or if there were more liquidators than one by the continuing liquidators.

(5) The meeting shall be held in manner provided by this Act or by the articles or in such manner as is on application by any contributory or by the continuing liquidators determined by the Court.

[16] In summary, we have read the appeal records and the able submissions of the parties. After giving much consideration to the submissions of the

learned counsel for the respondent, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) an application for remuneration under ss 237 and 274 is misconceived when there is a specific section for remuneration, in relation to voluntary winding up;

(b) if there is a dispute as to remuneration, it is related to a contractual claim and it must be brought by way of civil suit to recover professional fees, unless the CA 1965 provides for. In the instant case, s 258 does not even permit the court to give directions on remuneration;

(c) we agree with learned counsel for the appellant that none of the authorities cited by learned counsel for the respondent relate to issues on the remuneration of a liquidators in a voluntary winding up. The said submission, inter alia, reads as follows:

(a) *Meadow Springs Fairway Resort Ltd (in Liq) v Balanced Securities Ltd (No 3)* [2007] FCA 1443, relates to a dispute between creditors about the entitlement to proceeds of liquidation and competing claims;

(b) *Walley, in the Matter of Poles & Underground Pty Ltd (Administrator Appointed)* [2017] FCA 486, deals with a position of conflict of interest on the part of liquidators and a direction sought to this effect;

(c) *Lewis v LG Electronics Australia Pty Ltd* [2016] VSC 63, relates to directions for approval of compromises based on legal advice;

(d) *Re Smouha Fabrics Pty Ltd* [2012] NSWSC 1585, deals with directions on distributions of funds; and

(e) *Warner, Re GTL Trade Up* [2015] 104 ACSR 633, relates to entitlement to indemnity out of monies held on trust.

[17] Even in the event ss 237 or 274 of CA 1965 applies, we take the view that there was no sufficient material before the court in the nature of expert evidence for the court to determine the issues related to remuneration (see *SP Veloo & Co v Affin Bank Bhd* [2017] MLJU 1042; [2017] 5 AMR 537). There was also a lack of evidence that the liquidators had done actual work.

[18] On the preliminary objection taken by the respondent that the decision of the learned judge under ss 237 or 274 is not appealable, we take the view on the factual matrix of the case, the preliminary objection has no merit. In the instant case, the court has no power or jurisdiction to deal with it under both the provisions relied on. The issue of remuneration under s 237 which relates to compulsory winding up and s 274 which relates to voluntary winding up cannot be read together. It is a case of misdirection which warrants appellate intervention.

[19] For reasons stated above, the appeal is allowed with no order as to costs. The order of the High Court is set aside. Deposit is to be refunded.

We hereby order so.

Appeal allowed.

Reported by Ashok Kumar